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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 573

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

ALTON JOSEPH SCARBOROUGH, JR.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Brief in Support Thereof

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlantic Coast Line Railroad Company, a domestic corporation, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on December 3, 1949.

A.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254. The decision of the United States Court of Appeals for the Fourth Circuit was rendered on December 3, 1949.

B.

Summary Statement of Matter Involved

On the 17th day of March, 1949, Alton Joseph Scarborough, Jr., filed a complaint against Atlantic Coast Line Railroad Company in the District Court for the Eastern District of Virginia, Richmond Division, under the Federal Employers Liability Act, to recover for personal injuries sustained on the 24th day of September, 1944. Section 6 of the Federal Employers Liability Act (U.S.C.A. Title 45, Sec. 56) provides:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

The plaintiff-respondent alleged in his petition that by fraud practiced on him by the Atlantic Coast Line Railroad Company, he was induced to let the three years pass without instituting action and asks for recovery. The Atlantic Coast Line Railroad Company filed a motion to dismiss the action because it was not brought within the time during which the statute says such an action may be maintained. The District Court sustained the motion, stating in its memorandum opinion (R. p. 5) that the limitation imposed by Section 6 of the Federal Employers Liability Act is not an ordinary statute of limitation, but a limitation on the

exercise of the right created by that Act, and will not be tolled by infancy or fraud and cannot be waived in the manner of an ordinary statute of limitation. The respondent appealed the case to the United States Court of Appeals for the Fourth Circuit which Court reversed the action of the District Court in a judgment entered December 3, 1949, holding that fraud will toll the running of the limitation imposed by Section 6 of the Act.

C.

Question Presented

Is the three year period prescribed by Section 6 of the Federal Employers Liability Act (U.S.C.A. Title 45, Section 56), for the institution of actions under that Act extended by such fraud as would toll the running of an ordinary statute of limitations, i.e., one which relates only to the remedy and not to the right of action itself?

D.

Reasons Relied on for Allowance of Writ

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision in direct conflict with that of the Third Circuit Court of Appeals in *Damiano* v. *Pa. R. Co.*, 161 Fed. 2d, 534 (decided in 1947), in which the same question involved in the present case was presented, and it was directly held that the limitation imposed by Section 6 of said Act is not tolled by fraud.

2. This decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the decisions of the Circuit Court of Appeals for the First Circuit, Second Circuit, Fifth Circuit, and Eighth Circuit. Each of those Courts has had occasion to consider and decide a question

arising under Section 6 of said Act. Although the direct, narrow question presented in each of those cases did not involve fraud, each Court in its examination of the effect and extent of the limitation has held that fraud does not toll the limitation.

3. The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States involving the question whether the limitation prescribed in a statute granting a right, and particularly whether the limitation prescribed by Section 6 of said Act, can be tolled in the manner of an ordinary statute of limitations.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered by that Court in this case on December 3, 1949, and that the said order be reversed by this Honorable Court, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

J. M. TOWNSEND
COLLINS DENNY, JR.
HOWARD C. VICK
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1949

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

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Brief In Support of Petition for Writ of Certiorari

I.

Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Fourth Circuit (R. p. 16), is reported in Fed. 2d . The memorandum opinion of the District Court of the United States for the Eastern District of Virginia appears on page 5 of the record.

II.

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, section 1254. The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on December 3, 1949 (R. p. 27).

III.

Statement of the Case

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to with the request that it be considered as here incorporated by reference.

IV.

Question Presented

The question specifically brought forward by the Petition for Writ of Certiorari appears under heading "C" of the Petition. Again in the interest of brevity, it is not here repeated, but is referred to with the request that it be considered as here incorporated by reference.

V.

Summary of Argument

Since the limitation imposed by Section 6 of the Federal Employers Liability Act (U.S.C.A. Title 45, Section 56) is a limitation not only on the remedy but also on the right of action itself, and was intended so to be, such limitation

is not extended by such fraud as would toll the running of the ordinary statute of limitations, i.e., one which relates to the remedy only and not to the right of action.

VI.

Argument

The United States Court of Appeals, Fourth Circuit, of course, recognizes the origin of the right asserted in the complaint is purely statutory and has admitted that the limitation contained in the Federal Employers Liability Act is of the "substantive type," i.e., a limitation on the right of action and not merely on the remedy. Therefore, no argument will be made here as to the nature of the limitation.

However, in spite of this classification of the limitation by the Circuit Court, it held that since *Osbourne* v. *United States*, 164 F. (2d) 767 (in which the court held that this limitation in the Act was extended or tolled for the period during which plaintiff was interned by Japan during World War II), and *Frabutt* v. *New York, Chicago & St. Louis Railroad Co.*, 84 F. Supp. 460 (wherein it was held that the limitation period was extended or tolled as between citizens of countries at war) had provided a "chink in the supposedly impregnable armor of the substantive time limitation of the Act", and since no previous case had fairly faced the question here involved, it did not consider itself "bound by the seeming weight of judicial authority" and, accordingly, felt free to decide the present question on principle and without reference to the views heretofore expressed by this and other Courts. Having reached this point, the Circuit Court then decided that there was no reason for the distinction between substantive and remedial limitations, and that, therefore, it would hold that fraud does extend the period of the limitation imposed by Section 6 of Act.

This is directly in the teeth of the decision in *Damiano* v. *Pa. R. Co.*, (1947) 161 F. 2d 534. That case squarely presented the question here present, and it was squarely decided that fraud does not extend the period prescribed by Section 6 of the Federal Employers Liability Act. In the *Damiano Case*, Circuit Court Judge McLaughlin, in speaking for the Third Circuit Court of Appeals, said:

> " * * * On behalf of Conrad and based on his affidavit, it is claimed that he agreed to compensation in reliance upon defendant's implicit representation that the matter fell exclusively within state law. Damiano says in his statement that he was induced to sign a Workmen's Compensation Agreement by an agent of the defendant assuring him that 'you are not signing anything bad; we have to send that into Harrisburg and approve your compensation.'
>
> As the Supreme Court held in *Central Vermont R.* v. *White*, 1915, 238 U. S. 507, 511, 35 S. Ct. 865, 867, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, Section 6 of the Federal Employers' Liability Act not only 'bars the remedy, but destroys the liability' after the lapse of time. It is a 'special statutory limitation qualifying a given right.' 19 Am. & Eng. Enc., 2nd Ed. 150. As to such a statute Chief Justice Waite said in The Harrisburg, 119 U. S. 199 at page 214, 7 S. Ct. 140 at page 147, 30 L. Ed. 358.
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> * * *
>
> Such statutes cannot be tolled, after the manner of statutes of limitation, even for fraud or concealment by the defendant which prevent the plaintiff from bringing the action within time. Pollen v. Ford Instrument Co., 2 Cir., 1940, 108 F. 2d 762, 763; United States ex rel. Nitkey v. Dawes, 7 Cir., 1945, 151 F. 2d 639, 644, certiorari denied, 1946, 327 U. S. 788, 66 S. Ct. 808. Section 6 of the Act in question, since its enactment in slightly different form, has been con-

> strued to be in this category. Central Vermont R. Co. v. White (supra); Flynn v. New York et seq. R., 1931, 283 U. S. 53, 56, 51 S. Ct. 357, 75 L. Ed. 837, 72 A.L.R. 1311. Being in this category it cannot be tolled by fraud or concealment. Bell v. Wabash R. Co., 8 Cir., 1932, 58 F. 2d 569, 572."

In the two cases relied on by the Circuit Court as providing the chinks in the "supposedly impregnable armor" of the substantive time limitation of the Act, both the First Circuit Court in the *Osbourne Case* and the District Court in the *Frabutt Case* held fraud does not toll the running of the limitation period.

In the first of these cases, the Court, in speaking of the limitation imposed by the Federal Employers Liability Act, Jones Act and Suits in Admiralty Act, said:

> " * * * ; that the period of limitation under any of these Acts will not be extended as it would be in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant; and the defendant cannot waive the defense of the period of limitations."

Similar language is to be found in the decision in the *Frabutt Case*. In *Bell* v. *Wabash Ry. Co.,* (8th C.C.A., 1932), 58 F. 2d 569, the Court said of the limitation in the Federal Employers Liability Act:

> "There could be no waiver of this provision as there might be of the statute of limitations. The time would not be extended by fraud practiced or concealment such as might affect an extension of an ordinary statute of limitations under certain circumstances."

See also: *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, 283 U. S. 53, 51 S. Ct. 357, 75 L. Ed. 837, 72 A.L.R. 1311; *United States* v. *McCord*, 233 U. S. 157, 58 L. Ed. 893, 34 S. Ct. 550; *Winfree* v. *Northern Pacific Railway Co.*, 227 U. S. 296; *Carpenter* v. *Erie Railroad Co.*, (5th C.C.A., 1942), 132 F. (2d) 362, cert. den. 318 U. S. 788; *Wabash Railway Co.* v. *Bridal*, (8th C.C.A., 1938), 94 F. (2d) 117, cert. den. 305 U. S. 602; *Rademaker* v. *E. D. Flynn Export Co.*, (5th C.C.A., 1927), 17 F. (2d) 15; *American Railroad Co.* v. *Coronas*, (1st C.C.A., 1915), 230 Fed. 545; *Partee* v. *St. Louis & San Francisco Railroad Co.*, (8th C.C.A., 1913), 204 Fed. 970; *Wilson* v. *Missouri Railroad Co.*, 58 F. Supp. 844; *Morrison* v. *Baltimore & Ohio Railroad Co.*, 40 App. Cas. D. C. 391; *Gauthier* v. *Atchison, Topeka & Santa Fe Railway Co.*, 176 Wis. 245, 186 N. W. 619; *Bement* v. *Grand Rapids etc., Ry. Co.*, 194 Mich. 64, 160 N. W. 424; *Omin* v. *Baltimore & Ohio Southwestern Railway Co.*, 8 Ohio App. 161.

The Fourth Circuit Court in deciding that the *Osbourne* and *Frabutt Cases* provided it with an opportunity to re-appraise the effect of the limitation prescribed in the Federal Employers Liability Act, failed to give effect to the distinction between the circumstances in those two cases in which the plaintiff was physically denied access to the courts and, to use the apt expression of Judge Clifford in *Hanger* v. *Abbott*, 73 U. S. 532, 18 L. Ed. 939 (the case on which those two decisions rest), was prevented by the "invincible necessity" of war from instituting action, on the one hand, and the cases decided by the other Circuit Courts of Appeal and this Court in which the plaintiff at all times had access to the courts open to him, on the other hand.

It is respectfully submitted that the Circuit Court erred in reversing the decision of the District Court.

VII.

Conclusion

In conclusion counsel for the petitioner respectfully submit that for the reasons herein set forth a Writ of Certiorari should be granted the petitioner and that this Court should review and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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